

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
)
HAWAII ELECTRIC LIGHT COMPANY, INC.) DOCKET NO. 2017-0122
)
For Approval of a Power Purchase)
Agreement for Renewable Dispatchable)
Firm Energy and Capacity.)

ORDER NO. **38443**

(1) DENYING HAWAII ELECTRIC LIGHT COMPANY, INC.'S
MOTION FOR RECONSIDERATION OF DECISION AND ORDER NO. 38395;
AND (2) DENYING HU HONUA BIOENERGY, LLC'S MOTION FOR
RECONSIDERATION, CLARIFICATION, AND FURTHER HEARING OF
ORDER NO. 38395, ISSUED MAY 23, 2022

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By this Order,¹ the Public Utilities Commission ("Commission"), denies: (1) HELCO's Motion for Reconsideration, filed on June 2, 2022; and (2) Hu Honua's Motion for Reconsideration, filed on June 2, 2022, including Hu Honua's request for a hearing on its Motion for Reconsideration.²

¹The Parties to this docket are HAWAII ELECTRIC LIGHT COMPANY, INC. ("HELCO"), HU HONUA BIOENERGY, LLC ("Hu Honua"), and the DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, DIVISION OF CONSUMER ADVOCACY ("Consumer Advocate"). The Commission has also granted Participant status to LIFE OF THE LAND ("LOL"), TAWHIRI POWER, LLC ("Tawhiri"), and HAMAKUA ENERGY, LLC ("Hamakua"). See Order No. 34554, "Opening a Docket to Review and Adjudicate Hawaii Electric Light Company, Inc.'s Letter Request for Approval of Amended and Restated Power Purchase Agreement, Filed in Docket No. 2012-0212 on May 9, 2017," filed May 17, 2017 ("Order No. 34554").

²"Hawaii Electric Light Company, Inc.'s Motion for Reconsideration of Decision and Order No. 38395; Memorandum in

As a result, there are no remaining issues for resolution in this proceeding and this docket is considered closed.

I.

BACKGROUND

On May 23, 2022, the Commission issued Decision and Order No. 38395, which denied HELCO's letter request for approval of the Amended and Restated Power Purchase Agreement, dated May 5, 2017, between HELCO and Hu Honua ("Amended PPA"³) under which HELCO would purchase energy and capacity from Hu Honua's biomass facility on Hawaii Island (the "Project").⁴ In pertinent part, the Commission found that:

- (1) the Project will result in significant [greenhouse gas ("GHG")] emissions; and
- (2) Hu Honua's proposed "carbon commitment" ("Carbon Commitment") to sequester more GHG emissions than are produced by the Project relies on speculative assumptions and unsupported assertions. As a result, the Commission is not convinced that the Project will reduce

Support of Motion; and Certificate of Service," filed on June 2, 2022 ("HELCO Motion"); and "Hu Honua Bioenergy, LLC's Motion for Reconsideration of Order No. 38395, Issue May 23, 2022; Memorandum in Support of Motion; and Certificate of Service," filed on June 2, 2022 ("Hu Honua Motion").

³"Hawaii Electric Light Company, Inc.'s Amended and Restated Power Purchase Agreement dated May 5, 2017," filed on May 9, 2017. The Amended PPA is attached as Exhibit A to this filing. For ease of reference, the Commission's references to the "Amended PPA" in this Order refer to pages number of Exhibit A.

⁴Decision and Order No. 38395, filed on May 23, 2022 ("D&O No. 38395").

GHG emissions, and has concerns about the potentially significant long-term environmental and public health impacts of the Project if the Amended PPA is approved.

In addition, the Commission finds that the Amended PPA is likely to result in high costs to ratepayers, both through its relatively high cost of electricity and through the potential displacement of other, lower cost, renewable resources. In comparison, the Project is not expected to deliver unique benefits to HELCO's system, nor [is it] urgently required at this time. Upon weighing these considerations, the Commission concludes, based on the record before it, that approving the Amended PPA is not prudent or in the public interest and denies HELCO's Letter Request.⁵

On June 2, 2022, both HELCO and Hu Honua filed their separate Motions for Reconsideration.

On June 3, 2022, the Commission, on its own motion, issued Order No. 38414, which provided the other Parties and Participants an opportunity to file replies to HELCO's and Hu Honua's Motions for Reconsideration.⁶ Order No. 38414 also allowed for HELCO and Hu Honua to file responses to any replies. Replies by the Consumer Advocate, Tawhiri, and LOL were due by June 13, 2022; responses by HELCO and Hu Honua were due by June 17, 2022.⁷

⁵D&O No. 38395 at 2.

⁶Order No. 38414, "Allowing Replies and Responses to Motions for Reconsideration of Decision and Order No. 38395, Filed On June 2, 2022," filed on June 3, 2022 ("Order No. 38414").

⁷Order No. 38414 at 3.

On June 13, 2022, the Consumer Advocate, Tawhiri, and LOL all filed replies to HELCO's and Hu Honua's Motions for Reconsideration.⁸

On June 17, 2022, HELCO and Hu Honua submitted respective responses to the Consumer Advocate's Reply, LOL's Reply, and Tawhiri's Replies.⁹

⁸"Division of Consumer Advocacy's Consolidated Response to Hu Honua Bioenergy, LLC's Motion for Reconsideration, Clarification, and Further Hearing of Order No. 38395, and Hawaii Electric Light, Inc.'s Motion for Reconsideration of Decision and Order No. 38395," filed on June 13, 2022 ("CA Reply"); "Life of the Land's Reply to Motions for Reconsideration of Decision and Order No. 38395, Filed on June 2, 2022; and Certificate of Service," filed on June 13, 2022 ("LOL Reply"); "Tawhiri Power LLC's Reply to HELCO's Motion for Reconsideration of Decision and Order No. 38395," filed on June 13, 2022 ("Tawhiri HELCO Reply"); and "Tawhiri Power LLC's Reply to Hu Honua Bioenergy, LLC's Motion for Reconsideration, Clarification, and Further Hearing of Order No. 38395, Filed on June 2, 2022," filed on June 13, 2022 ("Tawhiri Hu Honua Reply").

⁹"Hawaii Electric Light Company, Inc.'s Consolidated Response to the Consumer Advocate, Participant Life of the Land, and Participant Tawhiri Power LLC's Replies to Motion for Reconsideration of Decision and Order No. 38395; and Certificate of Service" filed on June 17, 2022 ("HELCO Response"); and "Hu Honua Bioenergy, LLC's Responses to the Division of Consumer Advocacy, Life of the Land, and Tawhiri Power LLC's Replies to Hu Honua Bioenergy, LLC's Motion for Reconsideration, Clarification, and Further Hearing of Order No. 38395, Filed May 23, 2022; and Certificate of Service," filed on June 17, 2022 ("Hu Honua Response").

II.

LEGAL STANDARD

Motions for reconsideration are governed by HAR chapter 16-601, which includes subchapter 14. HAR §§ 16-601-137, 16-601-139, 16-601-140, and 16-601-142 of subchapter 14 provide:

§16-601-137 Motion for reconsideration or rehearing. A motion seeking any change in a decision, order, or requirement of the commission should clearly specify whether the prayer is for reconsideration, rehearing, further hearing, or modification, suspension, vacation, or in a combination thereof. The motion shall be filed within ten days after the decision or order is served upon the party, setting forth specifically the grounds on which the movant considers the decision or order unreasonable, unlawful, or erroneous.

. . . .

§16-601-139 Additional evidence. When, in a motion filed under this subchapter, a request is made to introduce new evidence, the evidence adduced shall be stated briefly, that evidence must not be cumulative, and an explanation must be given why that evidence was not previously adduced.

§16-601-140 Replies to motions. The commission may allow replies to a motion for rehearing or reconsideration or a stay, if it deems those replies desirable or necessary.

. . . .

§16-601-142 Oral argument. Oral argument shall not be allowed on a motion for reconsideration, rehearing, or stay, unless requested by the commission or a commissioner who concurred in the decision.

"[T]he purpose of a motion for reconsideration is to allow the parties to present new evidence and/or arguments that could not have been presented during the earlier adjudicated motion." Tagupa v. Tagupa, 108 Hawaii 459, 465, 121 P.2d 924, 930 (Haw. Ct. App. 2000). However, "[r]econsideration is not a device to relitigate old matters or to raise arguments or evidence that could and should have been brought during the earlier proceeding." Id. (citing Ass'n of Apartment Owners of Wailea Elua v. Wailea Resort Co., Ltd., 100 Hawaii 97, 110, 58 P.3d 608, 621 (Haw. 2002) and quoting Sousaris v. Miller, 92 Hawaii at 513, 993 P.3d at 547).

III.

DISCUSSION

A.

Denying Hu Honua's Request For A Hearing On Its Motion For Reconsideration

In its Motion for Reconsideration, although acknowledging that HAR § 16-601-142 is the controlling authority for hearings on a motion for reconsideration, Hu Honua nonetheless seeks a hearing on its Motion pursuant to HAR § 16-601-41.¹⁰

¹⁰Hu Honua Motion at 1-2.

As HAR § 16-601-142 is the more specific rule governing this situation, it is controlling, compared to HAR § 16-601-41.¹¹ As Hu Honua acknowledges, HAR § 16-601-142 provides: "Oral argument shall not be allowed on a motion for reconsideration, rehearing, or stay, unless requested by the [C]ommission or a [C]ommissioner who concurred in the decision." No Commissioner concurred in D&O No. 38395, nor has the Commission requested a hearing on Hu Honua's Motion for Reconsideration. Thus, Hu Honua's request for a hearing on its Motion for Reconsideration is denied.

Further, the Commission has provided an opportunity for Hu Honua to respond to the arguments raised in the other Party's and Participants' Replies, to which Hu Honua has taken advantage of to submit approximately 830 pages, collectively, of briefing and exhibits in support of its request for reconsideration of D&O No. 38395. These provide Hu Honua with sufficient opportunity to make its case for reconsideration.

¹¹See County of Hawaii v. UNIDEV, LLC, 129 Hawaii 378, 390, 301 P.3d 588, 600 (2013) (citing State v. Hussein, 122 Hawaii 495, 525, 229 P.3d 313, 343 (2010)) ("It is well settled that 'where there is a plainly irreconcilable conflict between a general and a specific statute concerning the same subject matter, the specific will be favored.'").

B.

Denying HELCO's And Hu Honua's Motions For Reconsideration

Based on review of the record, including HELCO's and Hu Honua's Motions and related filings and responsive briefings from the Parties and Participants, the Commission finds and concludes that neither HELCO nor Hu Honua has met its burden to support reconsideration of D&O No. 38395. As discussed, below, the Commission believes that the findings and conclusions in D&O No. 38395 are soundly grounded in the record developed in this proceeding. Furthermore, the Commission notes that many of the arguments raised in HELCO's and Hu Honua's Motions are arguments that were raised, or could have been raised, during the course of this proceeding. As a result, it is inappropriate to raise them now in the context of a motion for reconsideration.¹²

The Commission observes that HELCO's and Hu Honua's Motions for Reconsideration rely on similar arguments and addresses them concurrently in this Order. The Commission will not repeat each of the individual points raised in the Motions, but instead will address them categorically, as set forth below.

¹²See Tagupa, supra.

The Commission Did Not Exceed The Scope Of Remand

The Commission is not persuaded that it exceeded the scope of the Hawaii Supreme Court's ("Court") remand by including for consideration the Amended PPA's total costs, including the pricing structure.¹³ As noted in Order No. 37852, the Statement of Issues on remand are drawn directly from the Court's explicit language in HELCO I¹⁴ and HELCO II.¹⁵ In remanding this matter back to the Commission, the Court in HELCO II directly quoted HELCO I, in which it instructed the Commission to provide LOL with "an opportunity to meaningfully address the impacts of approving the Amended PPA on LOL's members' right to a clean and healthful environment, as defined by HRS Chapter 269," which included "express consideration of GHG emissions that would result from approving the Amended PPA, whether the cost of energy under the Amended PPA is reasonable in light of the potential for GHG emissions, and whether the terms of the Amended PPA are prudent and in the public interest, in light of its potential hidden and

¹³See HELCO Motion at 3-4; and Hu Honua Motion at 9-14. See also D&O No. 38395 at 92-96.

¹⁴Matter of Hawaii Elec. Light Co., Inc., 145 Hawaii 1, 445 P.3d 673 (2019) ("HELCO I").

¹⁵See Order No. 37852 at 7-9. See also Matter of Hawaii Elec. Light Co., Inc., 149 Hawaii 239, 487 P.3d 708 (2021) ("HELCO II").

long-term consequences."¹⁶ This clearly contemplates a comparison and balancing of the costs of the Amended PPA against the potential GHG emissions associated with the Project.¹⁷ This point is supported by the Court's ruling in HELCO II, where the Court clarified that "the PUC's 2017 approval of the Amended PPA remains vacated, and the 2017 waiver remains valid and in force[,]"¹⁸ which provides context for interpreting HELCO I - i.e., while the waiver is still in effect, approval of the Amended PPA is vacated and must be re-examined, including, but not limited to, express consideration of the Project's GHG impact, pursuant to HRS § 269-6(b).

Further, as noted by the Consumer Advocate, the fact that the Court clearly vacated the 2017 Amended PPA approval undermines the arguments that other parts of the Amended PPA remained intact following HELCO I, or that the Commission's scope

¹⁶HELCO II, 149 Hawaii at 242, 487 P.3d at 711 (citing HELCO I, 145 Hawaii at 25, 445 P.3d at 698) (emphasis added). See also HELCO I, 145 Hawaii at 24, 445 P.3d at 696 (stating that the Commission's findings regarding the "purchased power costs and arrangements set forth in the [Amended] PPA" require an analysis of the "long-term environmental and public health costs of reliance on energy produced at the proposed facility[.]").

¹⁷See HELCO I, 145 Hawaii at 28, 445 P.3d at 700 ("As set forth above, HRS § 269-6(b) requires the PUC to expressly consider the reduction of GHG emissions in its decision-making. The PUC failed to do so in determining whether the costs associated with the Amended PPA were reasonable, and in approving the Amended PPA.") (emphasis added).

¹⁸HELCO II, 149 Hawaii at 242, 487 P.3d at 711.

of review on remand was limited to solely considering the GHG impacts of the Project.¹⁹

Since the PPA approval was vacated and must be re-visited anew, the appropriate analysis is to consider GHG emissions from the Project in relation to the costs of the Amended PPA. This comports with considering GHG emissions as part of a holistic review of the Amended PPA, in which analysis of the Project's GHG impact cannot be reasonably divorced from consideration of other PPA factors (for example, net GHG emissions could be offset by other benefits to the Project, or vice versa).

2.

The Commission Applied The Appropriate Burden Of Proof

The Commission weighed the evidence using a preponderance of the evidence standard. In response to Hu Honua's arguments, the Commission does not agree that Hu Honua submitted the "only evidence" regarding GHG emissions, or that the Commission's review of Hu Honua's testimony and exhibits regarding

¹⁹See CA Reply at 8-10. See also id. at 12-13 ("Such an interpretation suggest that the remanded proceeding was merely an intellectual exercise and that, regardless of the GHG emissions analysis, since the other [Amended] PPA terms and conditions were already approved, the Commission should approve the [Amended] PPA as reasonable. Said differently, if the points of error sustained on appeal had no determinative impact on the Commission's decision, then this remand proceeding would serve as nothing more than a perfunctory rubber stamping and the matter should not have been remanded in the first place.").

GHG emissions somehow amounts to application of a de facto "clear and convincing" standard.²⁰ First, while Hu Honua did submit expert testimony and exhibits about the Project's GHG emissions, other Parties and Participants voiced concerns and submitted evidence regarding the assumptions and methodologies supporting the analysis, so the Commission does not agree with Hu Honua's characterization that it submitted the "only" evidence on this issue.²¹

Second, even in the theoretical absence of "responsive" expert testimony from another party or participant, simply vetting the assumptions, methodologies, and results of Hu Honua's exhibits does not mean that the Commission applied a higher "clear and convincing" standard.²² Rather, the courts have recognized that

²⁰See Hu Honua Motion at 87.

²¹Cf. LOL Reply at 10.

²²See Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 622 (1993) (holding that under any standard of review, including preponderance of the evidence, "the factfinder must evaluate the raw evidence, finding it to be sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with the requisite degree of certainty."). See also Ortco Contractors, Inc. v. Charpentier, 332 F.2d 283, 292 (5th Cir. 2003) ("An [Administrative Law Judge] 'is a factfinder and is entitled to consider all credibility inferences. He can accept any part of an expert's testimony; he may reject it completely.'") (citing Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1990)).

an agency, acting as a factfinder, has the discretion to determine the credibility of a witness and weigh the evidence before it.²³

Furthermore, as reflected in D&O No. 38395, the Commission did not subject Hu Honua's Project GHG analysis to unreasonably rigorous scrutiny, but merely engaged in basic inquiries, such as the estimated Project emissions, the purported offsets or reductions from sequestration efforts, the evidence supporting these assumptions, and what preparation had gone into the ability to purchase carbon offsets if sequestration efforts were insufficient.²⁴ These are basic inquiries that go to the heart of determining whether it is more likely than not that Hu Honua will be able to support its Carbon Commitment and what

²³Cf. LOL Reply at 10-11 (citing State v. Pioneer Mill Co., Ltd., 64 Haw. 168, 179, 637 P.2d 57, 65 (1996) (citing Territory v. Adelmeyer, 45 Haw. 144, 163, 363 P.2d 979, 989 (1961)); State v. Eastman, 81 Hawaii 131, 139, 913 P.2d 57, 65 (1996); Sierra Club v. D.R. Horton-Schuler Homes, LLC, 136 Hawaii 505, 52, 364 P.3d 213, 230 (2015); In re Gray Line Hawaii, Ltd., 93 Hawaii 45, 52-53, 995 P.2d 776, 783-784 (2000); and Brown-Hunter v. Colvin, 806 F.3d 487, 492 (9th Cir. 2015)).

²⁴Cf. HELCO I, 145 Hawaii at 25, 445 P.3d at 697 (identifying the Commission's failure to make sufficient findings so as to allow the Court to determine the validity of its conclusions as a basis for remand). See also, id. at 11, 445 P.3d at 683 (reciting caselaw requiring an agency to make its findings "reasonably clear," "to allow the reviewing court to track the steps by which the agency reached its decision") (citations omitted); and Matter of Hawaii Gas, LLC, 147 Hawaii 186, 202, 456 P.3d 633, 649 (2020) (remanding rate case back to the Commission where the Commission failed to "substantiate [its] findings in a manner that would allow this court to track the steps by which it reached its decision.").

the GHG impact of the Project is likely to be. Thus, it was Hu Honua's unsatisfactory answers that compelled the Commission to find that there were too many concerns and uncertainties associated with the Project's GHG emissions to support Amended PPA approval, not the Commission's alleged application of a stricter "clear and convincing" standard.

3.

The Commission Did Not Apply A New Standard To The Project's GHG Analysis

HELCO and Hu Honua argue at various points in their Motions that the Commission applied a new standard to the Amended PPA in D&O No. 38395 by "requiring" the Project to be carbon neutral.²⁵ In addition, in its Response, Hu Honua alleges that the Commission created a new standard by analyzing the temporal impacts of the Project's GHG emissions.²⁶ The Commission is not persuaded by these arguments and observes that they mischaracterize D&O No. 38395, as well as the record in this proceeding.

As a preliminary matter, the Commission notes that it has never said that the Project must be carbon neutral to receive approval. The Commission's analysis of the Project's GHG

²⁵HELCO Motion at 2; and Hu Honua Motion at 8-9.

²⁶See Hu Honua Response at 12-15.

impact was framed by Hu Honua's claim that the Project would be "carbon negative," as stated in its Direct Testimony, and purportedly supported by the Project GHG analysis prepared by its consultant, ERM.²⁷ Thus, any differences in the Commission's analysis of the Project's GHG emissions in this proceeding compared to other projects in other proceedings does not reflect a new "standard" for reviewing GHG analyses, but rather, that the Project GHG emissions are expected to be significant and that offsetting sequestration estimates are generally speculative and not well supported by the record.

Put another way, the Commission did not apply a carbon neutral (or negative) "standard" to the Project; rather, Hu Honua argued that the Project would be carbon negative, and the Commission's concerns regarding the Project's likelihood of achieving carbon neutrality (or negativity) are framed in that context. The GHG analysis submitted by Hu Honua concluded that the Project would be net negative approximately 30,000 MT CO₂e over the Project's lifetime. However, Hu Honua's GHG analysis also estimated that the Project would produce approximately 8,000,000 MT CO₂e during this same time period and relied on

²⁷See "Hu Honua Bioenergy, LLC's Prehearing Testimonies; Exhibits 'Hu Honua-100' - 'Hu Honua 800'; and Certificate of Service," filed on September 16, 2021, at T-1, T-2, Exhibit Hu Honua-201, T-4, and Exhibit Hu Honua-401.

significant amounts of estimated carbon sequestration to produce the net negative result. Given carbon sequestration's vital role in offsetting the Project's significant stack emissions, the Commission reviewed Hu Honua's GHG analysis and determined that the sequestration estimates were based on speculative assumptions and were not sufficiently reliable. Thus, the Commission's identification of concerns and ultimate conclusions regarding Hu Honua's GHG analysis for the Project did not hold the Project to a new standard, but represented careful review of the assumptions, methodologies, and conclusions put forth by Hu Honua in its GHG analysis for the Project.

Similarly, the Commission's findings regarding the cumulative impact of the Project's GHG emissions were made in the context of examining Hu Honua's Carbon Commitment that the Project would be carbon negative on an annual basis by the end of 2035 and each year thereafter until the end of the PPA term (assuming operations begin in 2022).²⁸ The Commission did not apply a "new standard," but rather, reviewed the evidence presented by Hu Honua in support of this aspect of its Carbon Commitment. Although Hu Honua argues that the Commission's "independent analysis" somehow constitutes "self-created evidence," the points identified by Hu Honua support the conclusion that the Commission's

²⁸See D&O No. 38395 at 76-79.

analysis of this issue was both grounded in the record and soundly within the bounds of a reviewing agency's discretion.²⁹

Further, contrary to HELCO's and Hu Honua's arguments,³⁰ the Commission continued to apply the same standard for analyzing GHG emissions associated with the Project as was done in prior dockets - i.e., the Commission considered the net GHG impact of the Project by examining both the Project's estimated GHG emissions, as well as the estimated avoided GHG emissions associated with the Project.³¹ To the extent the Commission's analysis is not identical to those in prior dockets, this reflects the different characteristics of this biomass Project from prior projects, as discussed below.³²

HELCO's and Hu Honua's reliance on the Commission's review of GHG analyses in prior dockets³³ ignores the fundamental differences between this Project and those prior projects. Prior projects for which the Commission has required a

²⁹See Hu Honua Response at 24-25. See also D&O No. 38395 at 77-78, including n. 201. See also, HELCO I, 145 Hawaii at 11, 25, 445 P.3d at 683, 697; and Hawaii Gas, 147 Hawaii at 202, 456 P.3d at 649.

³⁰See HELCO Motion at 6-7; and Hu Honua Motion at 27-28.

³¹See D&O No. 38395 at 70-72.

³²Cf. CA Reply at 21-23; and LOL Reply at 15-16.

³³See HELCO Motion at 6; and Hu Honua Motion at 8-9.

GHG analysis³⁴ have generally involved the production of GHG emissions during extraction of raw materials and construction of the project facility, but otherwise have limited amounts of emissions during operations and decommissioning.³⁵ In contrast, the Project here represents the first time the Commission has reviewed the GHG impacts of a biomass facility, which not only contemplates GHG emissions associated with Project construction, but also a significant amount of GHG emissions occurring during Project operations, owing to the nature of the biomass plant (i.e., combusting plant matter to produce electrical energy), and a significant amount of purported sequestration occurring during Project operations.

In conducting its standard review, the Commission observed that the overall "net" lifecycle GHG estimate was dependent on the Project's GHG impact, and thus the concerns and uncertainties with Hu Honua's Project GHG analysis necessarily impacted the overall "net" GHG impact performed by HELCO's consultant, Ramboll.³⁶ For example, the substantial amount of GHG emissions associated with Project operations, estimated at

³⁴Review of a project's GHG impact was determined to be part of the Commission's statutory duties under HRS § 269-6(b) beginning with the Court's decision in In re Application of Maui Elec. Co., Ltd., 141 Hawaii 249, 408 P.3d 1 (2017).

³⁵See e.g., Hu Honua Motion, Exhibits 1, 2, 3, 4, 5, and 6.

³⁶See D&O 38395 at 70-72.

over 8,000,000 MT CO₂e, could easily outweigh the estimated 1,434,243 MT CO₂e of avoided emissions, which made it critical to scrutinize the sequestration estimates in ERM's GHG analysis.³⁷ In other words, even when taking avoided emissions into account, the Project's estimated GHG emissions are still substantial, and the reasonableness of Hu Honua's sequestration estimates are essential to support its claim that the Project's GHG impact will be minimal or negative.

4.

The Commission Did Not Violate Hu Honua's Right To Due Process

Hu Honua raises a number of arguments asserting that the Commission violated Hu Honua's right to due process by basing its findings and conclusions in D&O No. 38395 on "new evidence" and "expert opinion" outside of the record.³⁸ The Commission disagrees with these characterizations and affirms that its conclusions in D&O No. 38395 are all based on the evidentiary record developed in this proceeding.

The Commission's analysis of the material in the record does not constitute "new evidence" or "expert opinion."

Upon review of Hu Honua's arguments, the Commission finds that

³⁷Cf. LOL Reply at 16-18.

³⁸See Hu Honua Motion at 99-100.

D&O No. 38395 does not feature "new evidence" or "expert opinion," but merely the Commission's review of the evidence submitted in the record.³⁹ Hu Honua's arguments revolve around the Commission's findings regarding the Hu Honua's Project GHG analysis; however, as is plainly documented in D&O No. 38395, the Commission merely reviewed the worksheets supporting the analysis provided by Hu Honua and identified discrepancies and concerns.⁴⁰ Simply questioning the reasonableness of the assumptions underlying the GHG analysis or applying basic arithmetic to the values provided in the GHG analysis do not constitute "manufacturing new evidence" or introducing "expert opinion," as alleged by Hu Honua. Review of D&O No. 38395 affirms that the Commission's findings and conclusions are squarely rooted in the record, with numerous citations placed throughout to direct the reader to the pertinent source(s) in the record.

D&O No. 38395 reflects compliance with the Court's instructions that the Commission substantiate its findings in a way that allows the Court to "determine the validity of

³⁹Cf. CA Reply at 34 ("The Consumer Advocate notes that the development of findings is not a mere regurgitation of evidence put forth by parties and that the Commission's findings of fact and ultimate conclusions should not be somehow construed as either the introduction of new evidence or expert opinion."). See also HELCO I, 145 Hawaii at 11, 25, 445 P.3d at 683, 697; and Hawaii Gas, 147 Hawaii at 202, 456 P.3d at 649 (2020).

⁴⁰See generally D&O No. 38395 at 54-79.

its conclusions[.]”⁴¹ In this regard, D&O 38395 clearly explains the Commission’s analysis and the steps taken to arrive at its conclusions and concerns with Hu Honua’s Project GHG analysis. Simply because the Commission did not agree with Hu Honua and identified concerns with the reliability of Hu Honua’s GHG analysis does not mean the Commission created new evidence.

For example, “Table 4,” which Hu Honua cites as an example of “new evidence”⁴² is based on values provided by Hu Honua, which are then added cumulatively throughout the lifetime of the Project. Table 4 provides a citation to the record identifying where the values are located in the record, down to the specific cells in the worksheets, with a clear explanation for how the values were determined.⁴³ Similarly, the Commission’s discussion of the sensitivities of Hu Honua’s GHG analysis are all drawn directly from the record and any conversions are noted and utilize the conversion factor provided by Hu Honua.⁴⁴

⁴¹HELCO I, 145 Hawaii at 11, 25, 445 P.3d at 683, 697. See also, Hawaii Gas, 147 Hawaii at 202, 456 P.3d at 649.

⁴²See Hu Honua Motion at 35-38.

⁴³D&O No. 38395 at 77 n. 201.

⁴⁴See D&O No. 38395 at 65-66, including n. 183. In response to Hu Honua’s argument that the record does not support the Commission’s analysis of the sensitivity of even a 1% change in aboveground sequestration, Hu Honua Motion for Reconsideration at 27, the Commission observes that this is derived by the values

The Commission provided Hu Honua with sufficient due process to make its case to satisfy its burden of proof. Hu Honua argues that D&O No. 38395 relies on “new evidence” and “expert opinion” not presented in the record, which Hu Honua did not have an opportunity to address.⁴⁵ The Commission is not persuaded by these arguments. First, as discussed above, the Commission did not rely on any “new evidence” or “expert testimony” in reaching its finding and conclusions in D&O No. 38395. Rather, the points identified by Hu Honua reflect that the Commission conducted an independent review of the evidence submitted in the record by Hu Honua in support of its case.

Second, Hu Honua, along with HELCO, bears both the burden of proof and the burden of persuasion in this proceeding pursuant to HRS § 91-10(5).⁴⁶ Hu Honua’s position that it was entitled to an opportunity to preview and rebut any and all of the Commission’s questions, concerns, findings, and conclusions set forth in D&O No. 38395 inverts this relationship and instead presumes that the Commission was required to convince Hu Honua of the merits of

provided in Table 3, which are based on Hu Honua’s GHG analysis. See D&O No. 38395 at 66, including n. 183 and n. 184.

$6,319,815 * 0.01 = 63,198.15.$

⁴⁵See Hu Honua Motion at 99-100.

⁴⁶See Haw. Rev. Stat. § 91-10-(5).

its findings and conclusions, rather than Hu Honua needing to persuade the Commission of the merits of its case.

Third, the Commission provided Hu Honua with ample opportunities to make its case through this remanded proceeding, including the submittal of direct testimonies and exhibits, extensive discovery, an evidentiary hearing, and pre- and post-hearing briefing. In a number of instances, the Commission raised its concerns with various parts of Hu Honua's Carbon Commitment and Project GHG Analysis, and Hu Honua had the opportunity to address those concerns through the IR responses, through its pre- and post-hearing briefing, and during cross-examination at the evidentiary hearing.

5.

The Commission Did Not Clearly Err In Making Its Factual Findings

The Commission carefully reviewed the record in this proceeding, and supported its findings and conclusions in D&O No. 38395 with references to the record. The Commission does not believe it necessary to re-visit all of its findings here,⁴⁷

⁴⁷Cf. LOL Reply at 10 (discussing the Commission's discretion in determining the credibility and weight of evidence in the record). See also Tagupa, supra (noting that a motion for reconsideration is not a device to relitigate old matters).

but, for illustrative purposes, highlights a few examples of areas contested by HELCO and Hu Honua.

Environmental impacts of the Project. While Hu Honua claims that the Project will reduce GHG emissions, Hu Honua has not substantiated its sequestration estimates with reliable or transparent underlying assumptions or calculations despite being given opportunities to do so in this proceeding.⁴⁸ As discussed above, these sequestration estimates are crucial to offsetting the Project's stack emissions so as to make the Project net carbon negative, as proffered by Hu Honua.

The Commission's findings regarding Hu Honua's GHG analysis are drawn from evidence that Hu Honua submitted into the record. D&O No. 38395 summarizes the emission and sequestration figures presented in Hu Honua's GHG analysis⁴⁹ before detailing the Commission's specific concerns with Hu Honua's GHG Analysis.⁵⁰ This ultimately contributed to a larger concern about the total net GHG impact of the Project, as the large amount of Project stack

⁴⁸See e.g. Hu Honua Response to PUC-Hu Honua-IR-70.b, filed on January 10, 2022 (which asked for the underlying assumptions and calculations used to determine the "Net Aboveground Biomass Growth On Island" listed for each year in column G for "2- CO2 Simulation" and "3- CO2 Full" in the Updated Project GHG Analysis. Hu Honua did not provide the requested underlying assumptions and calculations in its response).

⁴⁹See D&O No. 38395 at 54-57.

⁵⁰See D&O No. 38395 at 58-69.

emissions, if not sequestered according to Hu Honua's estimates, could completely outweigh the avoided emissions estimated by HELCO.⁵¹

Much of Hu Honua's disagreement with the findings in D&O No. 38395 is rooted in its position that the Commission's independent review of Hu Honua's Project GHG analysis involves the creation of "new evidence" or "expert testimony" that is "outside the record;" however, as discussed above, the Commission disagrees with this characterization and is not persuaded by this argument.

Hu Honua's Carbon Commitment. Hu Honua takes issue with the Commission's findings regarding support for Hu Honua's Carbon Commitment. Aside from whether Hu Honua's GHG analysis for the Project supports its pledge for the Project to be carbon negative over its lifetime, Hu Honua maintains that its proposal to purchase carbon offsets and the Commission's inherent authority to enforce the Carbon Commitment satisfies Hu Honua's evidentiary burden.⁵² As discussed in D&O No. 38395, the Commission does not find these arguments compelling.

First, as discussed above, pursuant to HRS § 91-10(5), the applicants carry the burden of proof and persuasion in this

⁵¹See D&O No. 38395 at 70-72.

⁵²See Hu Honua Motion at 41-50. See also HELCO Motion at 10-13.

proceeding, and it is not incumbent on the Commission to fashion conditions to assist HELCO and Hu Honua in meeting their burden.⁵³

Second, the concerns raised in D&O No. 38395 regarding Hu Honua's proposal to supplement its Carbon Commitment through the purchase of carbon offsets were based on identified gaps in the record. The Commission attempted to solicit additional information about this proposal from Hu Honua, but received vague responses, coupled with Hu Honua's opinion that purchasing carbon offsets would not be necessary.⁵⁴ As noted in D&O No. 38395, this is insufficient, particularly in light of the concerns with Hu Honua's Project GHG analysis, which cast doubt on Hu Honua's sequestration estimates.⁵⁵ Further, Hu Honua did not introduce the idea of a reserve fund to support the purchase of carbon offsets until explicitly prompted by the Commission during the evidentiary hearing.⁵⁶ This aspect of Hu Honua's proposal has rapidly evolved (after discovery opportunities by other Parties and Participants have closed) in a seemingly ad hoc manner.⁵⁷

⁵³See D&O No. 38395 at 83. See also CA Reply at 26.

⁵⁴See D&O No. 38395 at 79-82.

⁵⁵See D&O No. 38395 at 82-83.

⁵⁶See Testimony of Jon Miyata, Recording of Hearing, Hearing Day 3, March 3, 2022, at 00:26:08-00:28:24 and 00:35:40-00:38:40.

⁵⁷See "Hu Honua Bioenergy, LLC's Post-Hearing Brief; Exhibits 'A'-'F'; and Certificate of Service," filed on March 29, 2022, at 28 (stating that Hu Honua agrees to place

Third, as noted in D&O No. 38395, if the Amended PPA were approved, the Commission would have limited options to enforce Hu Honua's Carbon Commitment.⁵⁸ While both HELCO and Hu Honua contend that the Commission possesses sufficient authority over Hu Honua to enforce Hu Honua's Carbon Commitment,⁵⁹ these arguments do not address the fundamental issues underlying the Commission's concerns.

D&O No. 38395 raised concerns with the Commission's practical ability to enforce the Carbon Commitment, not whether the Commission has the authority to do so. For example, D&O No. 38395 raised the concern of what options would be available to actually compel Hu Honua to meet its Carbon Commitment, and noted that there were only a handful of blunt tools available to the Commission, which could also potentially cause harm to ratepayers, such as preemptively voiding the Amended PPA before the full benefits of the Project are realized.⁶⁰

between \$100,000 to \$450,000 in a reserve fund to purchase carbon offsets, if necessary, and to place "additional funds" in the account, to cover any deficits); and Hu Honua Motion for Reconsideration at 45-46 (now stating that the \$450,000 will serve as "additional available funds above Hu Honua's pledge to place funds into the account each year over the 30-year term to cover the deficit and purchase carbon offsets.").

⁵⁸See D&O No. 38395 at 86-88.

⁵⁹See HELCO Motion at 10-13; and Hu Honua Motion at 47-50.

⁶⁰See D&O No. 38395 at 86-87.

The examples of conditions proposed by Hu Honua do not sufficiently address these concerns, as they merely suggest setting up reporting requirements which would notify the Commission if Hu Honua is not in compliance with the Carbon Commitment.⁶¹ Hu Honua has not offered in the record any proposed condition that would provide for meaningful enforcement of the Carbon Commitment. Absent such a condition, ratepayers may experience a situation in which the purported benefits of the Project are not realized, and instead must attempt to be salvaged through legal investigations by the Commission and potentially other legal proceedings.

HELCO's and Hu Honua's references to other instances in which the Commission has imposed conditions on developers are distinguishable from this situation.⁶² Pertinently, unlike other projects, Hu Honua's Carbon Commitment is fundamental to ensuring that the Project provides net benefits, without which the Project represents a high cost resource that is likely to produce a significant amount of GHG emissions (again, although Hu Honua maintains that its GHG analysis shows that the Project will be carbon negative over its lifetime, as discussed above and in D&O No. 38395, the Commission does not find this sufficiently

⁶¹See Hu Honua Motion at 48.

⁶²See HELCO Motion n at 12-13; and Hu Honua Motion at 48.

supported by the record). Thus, the importance of enforcing the Carbon Commitment is a critical issue here, and is distinguishable from other projects, where the benefits of the project are reasonably assured, and conditions are imposed, for example, to simply monitor a project's development or determine a project's final costs.⁶³ In light of these circumstances, the Commission's concerns regarding the enforceability of the Carbon Commitment were well-founded and the Commission reasonably declined to develop conditions to assist the applicants in meeting their evidentiary burden.

Project dispatch and bill impacts. Another point of disagreement raised by Hu Honua is the weight given in D&O No. 38395 to modeling performed by HELCO, versus Hu Honua, regarding dispatch of the Project and estimated customer bill impacts.⁶⁴ The Commission is not convinced by these arguments. As discussed in D&O No. 38395, the Commission considered the modeling results submitted by all the Parties and Participants, including by HELCO, Hu Honua, and the Consumer Advocate, and found HELCO's analysis more credible.⁶⁵

⁶³See LOL Reply at 30-31 (discussing Commission-imposed conditions in Docket Nos. 2018-0434, 2017-0108, and 2018-0053).

⁶⁴See Hu Honua Motion at 56-60; and 62-72.

⁶⁵See D&O No. 38395 at 100-107 and 111-117.

The Commission noted that HELCO's project dispatch analysis considered a wider variety of factors and reflected a more realistic assessment of the Project's impact to the grid, and was also corroborated by the Consumer Advocate's independent efforts.⁶⁶ The Commission considered Hu Honua's models and studies, but found them less credible due to a number of concerns with Hu Honua's assumptions. In particular, the Commission observed that Hu Honua's analysis assumed that the Project would exclusively displace HELCO's fossil fuel units, which ignored the presence of other renewable generating units on HELCO's system.⁶⁷ Further, HELCO stated that assuming that the Project would only displace fossil fuel units would be "contrary to the Company's practices and highly unlikely to represent the actual operational conditions," and that dispatching Hu Honua ahead of other fossil fuel units would violate HELCO's operating principles of economic dispatch.⁶⁸

Hu Honua's alternative bill impact analysis also assumed that the Project would exclusively displace fossil fuel units.

⁶⁶See D&O No. 38395 at 105-107 and 112-113.

⁶⁷See D&O No. 38395 at 111-112; see also, id. at 108 (citing HELCO Response to CA/HELCO-SIR-26.c.1, filed on November 18, 2021 (in which HELCO stated that "[t]he minimum dispatch of Hu Honua makes it impossible to ensure that no renewable resource energy output will be partially displaced by Hu Honua.")).

⁶⁸See D&O No. 38395 at 112 (citing HELCO Responses to CA/HELCO-SIR-28.a.1 and HHB-HELCO-SIR-1.a).

Moreover, even when the Commission considered an alternative scenario where all unapproved resources were removed from the bill impact analysis, benefits did not accrue to customers until late in the Project's lifetime (i.e., 2045-2051), reflecting that customers would experience significant bill impacts for the majority of the Amended PPA's term and placing the purported benefits far into the future, subjecting customers to greater risk.⁶⁹

Urgent need for the Project. Another argument raised by HELCO and Hu Honua is that the Commission did not properly consider the benefits and grid services that could be provided by the Project.⁷⁰ The Commission does not find these arguments persuasive. As an initial matter, the Commission notes that these arguments mischaracterize D&O No. 38395. D&O No. 38395 did not state that the Project would not provide grid needs or services - rather, D&O No. 38395 concluded that the Project would not serve any urgent grid needs, nor did it offer any unique grid services.⁷¹

By taking this point out of context, HELCO's and Hu Honua's arguments miss the point being made in D&O No. 38395.

⁶⁹See D&O No. 38395 at 115-116.

⁷⁰See HELCO Motion at 15-20; and Hu Honua Motion at 72-77.

⁷¹D&O No. 38395 at 108-109. Cf. Tawhiri HELCO Reply at 7.

After considering the potential for significant GHG emissions and the high costs of the Project, to both HELCO's system and customers, a pertinent question was whether, in exchange for these considerations, the Project was urgently needed or would provide grid services that could not otherwise be obtained from alternatives. Based on testimony provided by HELCO's witnesses, the Commission concluded that while the Project may be able to provide some grid services, the benefits of such services were not sufficient relative to the total costs of the Project, including the potential for GHG emissions and bill impacts to customers.

Ability to re-bid the Project. Hu Honua argues that the Commission's acknowledgment that Hu Honua may bid the Project in a future round of competitive bidding is not a legitimate option due to various administrative inefficiencies and because one of the conditions of HELCO's Request for Procurements ("RFP") is that a bidder cannot have an existing agreement with the utility.⁷² The Commission observes that although Hu Honua maintains that it has an effective agreement with HELCO at this time,⁷³ the Court

⁷²See Hu Honua Response at 30-32. See also D&O No. 38395 at 121.

⁷³See Hu Honua Response at 31. See also HELCO Response to HHB-HELCO-SIR-15.f.

vacated the Commission's prior 2017 approval of the Amended PPA⁷⁴ and the Commission has since denied HELCO's Letter Request for Approval of the Amended PPA in D&O No. 38395. Thus, Hu Honua's claim that it is precluded from participating in HELCO's upcoming RFP based on its "existing Amended PPA with HELCO" is not convincing.⁷⁵ Further, as discussed, below, the Amended PPA does not appear to have achieved its "Effective Date" as defined by its own provisions.⁷⁶

6.

The Commission Did Not Misinterpret
HRS § 269-6, As Amended By Act 82

Hu Honua argues that the Commission misinterpreted HRS § 269-6(b), as recently amended by Act 82, and that the Commission's review of the Project under that provision should be limited to comparing the Project to fossil fuel generation, but not

⁷⁴See HELCO I, 145 Hawaii at 28, 445 P.3d at 700 ("The PUC's 2017 D&O is therefore vacated and this case is remanded to the PUC for proceedings consistent with this opinion."); and HELCO II, 149 Hawaii at 242, 487 P.3d at 711 ("As a result, the parties are fixed in the same position they were in following HELCO I: the PUC's 2017 approval of the Amended PPA remains vacated, the 2017 waiver remains valid and in force, and the PUC, in considering the Amended PPA, remains obligated to follow the instructions we provided in HELCO I.").

⁷⁵Cf. HELCO Response to CA/HELCO-SIR-27, filed on November 18, 2021.

⁷⁶See Section III.8, infra.

other resources on HELCO's system (such as other renewable resources).⁷⁷ Hu Honua has previously argued for this narrower interpretation of HRS § 269-6(b), which the Commission has found unpersuasive in the past.⁷⁸

The Commission observes that Hu Honua rehashes these same arguments in favor of its narrower interpretation. As discussed above, a motion for reconsideration is not a tool to relitigate old matters. The Commission reiterated its position on this issue in D&O No. 38395,⁷⁹ and continues to hold that it does

⁷⁷See Hu Honua Motion at 88-94.

⁷⁸See "Hu Honua Bioenergy, LLC's Motion for the Commission to Consider Act 82 and Address Its Impact on Order No. 37852 Reopening Docket; Memorandum in Support of Motion; and Certificate of Service," filed on July 20, 2021; "Hu Honua Bioenergy, LLC's Motion to Confirm That Hawaii Revised Statutes Section 269-6(b), As Amended By Act 82 Applies To This Proceeding; Memorandum in Support of Motion; and Certificate of Service," filed on January 4, 2022; and "Hu Honua Bioenergy, LLC's Post-Hearing Brief; Exhibits 'A'-'F'; and Certificate of Service," filed on March 29, 2022 at 8-9. See also Order No. 37910, "(1) Denying Life of the Land's Motion for Reconsideration/Clarification of Order No. 37852 Filed July 12, 2021; (2) Denying Tawhiri Power LLC's Motion for Reconsideration of Order No. 37852, Filed on June 30, 2021, Filed July 12, 2021; (3) Denying Hu Honua Bioenergy, LLC's Motion for the Commission To Consider Act 82 and Address Its Impact On Order No. 37852 Reopening the Docket Filed July 20, 2021; (4) Partially Granting the Division of Consumer Advocacy's Motion for Leave to Respond Filed July 23, 2021; and (5) Dismissing All Other Related Procedural Motions," filed on August 11, 2021 ("Order No. 37910"), at 23-32; and Order No. 38183, "Addressing Hu Honua Bioenergy, LLC's Motion Regarding Applicability of HRS Section 269-6," filed on January 13, 2022, at 8-9.

⁷⁹See D&O No. 38395 at 92-95.

not believe that Act 82 narrows the scope of the Commission's review as argued by Hu Honua.

7.

The Commission Did Not Engage In Rulemaking Under Chapter 91

The Commission is also not persuaded that its interpretation of HRS § 269-6(b), as amended by Act 82, in this proceeding constitutes improper "rule-making" under HRS Chapter 91, as alleged by Hu Honua.⁸⁰

As stated by the Court:

[W]e reject Appellants' general contention that all statements of policy by the PUC require a rule-making procedure under [the Hawaii Administrative Procedures Act] prior to proceeding with the case. Rather, we recognize that rule-making is essentially legislative in nature because it operates in the future; whereas, adjudication is concerned with the determination of past and present rights and liabilities of individuals where "issues of fact often are sharply controverted."⁸¹

The Commission's application of HRS § 269-6(b) to this proceeding clearly has a present effect on the rights and liabilities of the Parties and Participants involved (e.g., HELCO's and Hu Honua's interests in the Amended PPA and

⁸⁰See Hu Honua Motion at 95-96.

⁸¹Application of Hawaiian Elec. Co., Inc., 81 Hawaii 459, 467, 918 P.2d 561, 569 (1996) (citing Shoreline Transp., Inc. v. Robert's Tours & Transp., 70 Haw. 585, 591, 779 P.2d 868, 872 (1989)).

LOL's members' interest in the Amended PPA's impact on their right to a clean and healthful environment) and was applied specifically to the Project based on the record in this proceeding. Accordingly, the Commission finds that its actions constituted adjudication of the issues in this proceeding, and not rule-making, as alleged by Hu Honua.⁸²

Further, the Court has recognized that even if a Commission decision by adjudication has a precedential effect, it does not constitute rule-making:

[I]n exercising its quasi-judicial function[,] an agency must frequently decide controversies on the basis of new doctrines, not theretofore applied to a specific problem, though drawn to be sure from broader principles reflecting the purpose of the statutes involved and from the rules invoked in dealing with related problems. If the agency decision reached under the adjudicatory power becomes a precedent, it guides future conduct in much the same way as though it were a new rule promulgated under the rule-making power, and both an adjudicatory order and a formal "rule" are alike subject to judicial review.⁸³

⁸²Cf. Hawaiian Elec., 81 Hawaii at 467, 918 P.2d at 569 ("Secondly, the choice between proceeding by 'general rule or by individual, ad hoc litigation is on that lies primarily in the informed discretion of the administrative agency.'") (citing Securities and Exchange Commission v. Chenery Corp., 332 U.S. 194, 203, 67 S.Ct. 1575, 1580, 91 L.Ed 1995 (1947)).

⁸³Hawaiian Elec., 81 Hawaii at 467, 918 P.2d at 569 (citing Shoreline, 70 Haw. at 591-92, 779 P.2d at 872) (brackets in the original).

Thus, even if the Commission's interpretation of HRS § 269-6(b), as amended by Act 82, used in D&O No. 38395 is subsequently adopted in future Commission decisions, this is not evidence of improper rule-making.

The Court has recognized policymaking may constitute an abuse of discretion by an agency in situations where: "(1) it is used to 'circumvent the requirements of the Administrative Procedures Act' by amending a recently amended rule or bypassing a pending rule-making proceeding; or (2) 'an agency's sudden change of direction leads to undue hardship for those who had relied on past policy.'"⁸⁴ Neither exception is applicable here. There is no recently amended rule or pending rule-making proceeding for HRS § 269-6(b) before the Commission, nor does D&O No. 38395 represent a "sudden change in direction" to "those who had relied on past policy" - if anything, it is the opposite, as D&O No. 38395 affirms that Act 82 has not changed the Commission's application of HRS § 269-6(b) to the Amended PPA and Project.

Hu Honua also alleges an abuse of discretion based on the Commission's reliance on "new evidence" and "expert opinion" outside of the record,⁸⁵ but, as discussed above, the Commission

⁸⁴Hawaiian Elec., 81 Hawaii at 468, 918 P.2d at 570 (citing Union Flights, Inc. v. Administrator, FAA, 957 F.2d 685, 688-89 (9th Cir.1992)).

⁸⁵See Hu Honua Motion at 96.

does not agree with these characterizations of its independent review of evidence submitted in the record.

8.

D&O No. 38395 Does Not Constitute A Regulatory Taking

As an initial matter, the Commission observes that this argument is similar to a prior equitable estoppel raised by Hu Honua, which the Commission did not find convincing.⁸⁶ For similar reasons, the Commission does not find Hu Honua's regulatory takings argument persuasive. Specifically, Hu Honua lacks a "vested interest" in the Amended PPA and therefore cannot allege a regulatory taking.⁸⁷

The Amended PPA defines its "Effective Date" as the latter of: (1) HELCO and Hu Honua entering into a settlement agreement to mutually release claims between Hu Honua and the Hawaiian Electric Companies⁸⁸ in Civil No. 16-00634;

⁸⁶See Order No. 37396, "(1) Denying Hu Honua Bioenergy, LLC's Motion for Reconsideration of Order No. 37205, Issued July 9, 2020, Filed July 20, 2020; and (2) Addressing Related Procedural Motions," filed on September 9, 2020 ("Order No. 37306"), at 23-28.

⁸⁷See Kepoo v. Kane, 106 Hawaii 270, 294, 103 P.3d 939, 963 (2005) ("To succeed on a takings claims, a claimant must first establish 'a vested protectable interest under the Fifth Amendment[.]'" (citing Sangre de Cristo Dev. Co., Inc. v. United States, 932 F.2d 891, 894 (10th Cir. 1991))).

⁸⁸The "Hawaiian Electric Companies" refers to HELCO and Hawaiian Electric Company, Inc. and Maui Electric Company, Ltd.

or (2) the earlier of an agreement to waive the requirement for a non-appealable Commission order approving the Amended PPA or a Commission order approving the Amended PPA.⁸⁹ As alluded to in the Participants' post-hearing briefs, HELCO and Hu Honua have already entered into a settlement agreement in Civil No. 16-00634⁹⁰; additionally, it does not appear that HELCO and Hu Honua have entered into an agreement to waive the Amended PPA's requirement of Commission approval, given their requests for the Commission to reconsider D&O No. 38395 and approve the Amended PPA. Thus, under these circumstances, the "Effective Date" of the Amended PPA appears to be the date of the Commission's approval of the Amended PPA.

The Amended PPA, Article I (Definitions) states: "'PUC Approval of Amendment Date' shall have the meaning set forth in Section 25.12(D) (PUC Approval of Amendment Date)."⁹¹ In turn, Section 25.12(D)(2) of the Amended PPA, "PUC Approval," provides, in relevant part:

⁸⁹See Amended PPA at 11 of 238 (defining "Effective Date"), 18 of 238 (defining "PUC Approval of Amendment Date"), 20 of 238 (defining "Waiver Agreement Date"), 22-23 (Section 2.2(C)(2), defining the Waiver Agreement), 125 of 238 (Section 25.12(D), defining "PUC Approval of Amendment Date"), and 130-131 of 238 (Section 25.26, defining "Settlement Agreement").

⁹⁰See LOL Reply at 14; and Tawhiri HELCO Reply at 3.

⁹¹Amended PPA at 18 of 238.

(a) If a PUC Approval of Amendment Order is issued and is not made subject to a motion for reconsideration filed with the PUC or an appeal, the PUC Approval of Amendment Order Date shall be the date one Day after the expiration of Appeal Period following the issuance of the PUC Approval of Amendment Order;

(b) If the PUC Approval of Amendment Order became subject to a motion for reconsideration, and the motion for reconsideration is denied or the PUC Approval of Amendment Order is affirmed after reconsideration, and such order is not made subject to an appeal, the PUC Approval of Amendment Date shall be deemed to be the date one Day after the expiration of the Appeal Period following the order denying reconsideration of or affirming the PUC Approval of Amendment Order; or

(c) If the PUC Approval of Amendment Order, or an order denying reconsideration of the PUC Approval of Amendment Order or affirming approval of the PUC Approval of Amendment Order after reconsideration, becomes subject to an appeal, then the PUC Approval of Amendment Date shall be the date upon which the PUC Approval of Amendment Order becomes a non-appealable order within the meaning of the definition of a Non-appealable PUC Approval of Amendment Order in Section 25.12(B) (Non-appealable PUC Approval of Amendment Order).⁹²

⁹²Amended PPA at 125-26 of 238 (emphasis added). Amended PPA, Section 25.12(B) states, in relevant part: "The term 'Non-appealable PUC Approval of Amendment Order' means a PUC Approval of Amendment Order that is not subject to appeal to any Circuit Court of the State of Hawaii, Intermediate Court of Appeal of the State of Hawaii or the Supreme Court of the State of Hawaii, because the permitted period for such an appeal (the 'Appeal Period') has passed without the filing of a notice of such an appeal, or that was affirmed on appeal . . . or was affirmed upon further appeal or appellate process, and that is not subject to further appeal,"

Consequently, LOL's appeal following Decision and Order No. 34726,⁹³ and the ensuing remand and subsequent appeal by Hu Honua following Order No. 37205,⁹⁴ has kept the Amended PPA in a constant state of review,⁹⁵ and there is no vested "right" to the Amended PPA that can form the basis for a claim of a regulatory taking under Fifth Amendment of the U.S. Constitution. Indeed, the only part of the Amended PPA that appears to be currently effective are provisions related to Hu Honua and HELCO making good faith efforts obtain a satisfactory PUC Approval of Amendment Order.⁹⁶ Put simply, while HELCO and Hu Honua may have executed the Amended PPA, the material provisions that could arguably form the basis for a vested interest (putting aside any consideration of whether a contracting party's interest in an approved PPA can ever be "vested") have not yet become effective,

⁹³Decision and Order No. 34726, filed on July 28, 2017 (approving the Amended PPA); see also, HELCO I.

⁹⁴Order No. 37205, "Denying Hawaii Electric Light Company, Inc.'s Request For A Waiver and Dismissing Letter Request For Approval Of Amended And Restated Power Purchase Agreement," filed on July 9, 2020; see also, HELCO II.

⁹⁵See HELCO II, 149 Hawaii at 242, 487 P.3d at 711 ("As a result, the parties are fixed in the same position they were in following HELCO I: the PUC's 2017 approval of the Amended PPA remains vacated, the 2017 waiver remains valid and in force, and the PUC, in considering the Amended PPA, remains obligated to follow the instructions we provided in HELCO I.") (emphasis added).

⁹⁶See Amended PPA at 22-23 of 238.

as there is no non-appealable Commission order approving the Amended PPA.

Moreover, Hu Honua cannot rely on the Commission's prior approval of the PPA as basis for reasonable expenditure of funds on the Project.⁹⁷ As previously discussed in addressing Hu Honua's equitable estoppel argument, Hu Honua did not have a reasonable basis for proceeding with the Project during the appeal period, given that the Commission's alleged "direction" to proceed with the Project was made within the context of the terms of the Amended PPA, which provided for a tolling period until a final, non-appealable order was issued, which Hu Honua acknowledged.⁹⁸

⁹⁷See Hu Honua Response at 29.

⁹⁸See Order No. 37306 at 23-28. See also Joint Letter From: D. Yamamoto and B. Bailey to Commission Re: Docket No. 2017-0122 - Hu Honua Bioenergy, LLC and Hawaii Electric Light Company, Inc.'s Joint Letter Regarding Paragraph No. 5 of Decision and Order No. 34726, Issued July 28, 2017, filed April 20, 2018 (acknowledging LOL's Notice of Appeal and stating that "[t]his appeal is currently pending before the Hawaii Supreme Court, preventing a Non-appealable PUC Approval of Amendment Order until such time the Order is affirmed and not subject to further appeal."); and Letter From: B. Bailey To: Commission Re: Docket No. 2017-0122 - Hawaii Electric Light Company, Inc.'s Hu Honua Project Status Update, filed February 12, 2019 (noting, inter alia, that "under the terms of the [Amended] PPA, the [Amended] PPA is not effective unless the PUC's approval of the [Amended] PPA ('PUC Approval of Amendment Order') is final and non-appealable ('Final Approval Requirement'). Given that this matter is still on appeal with Hawaii Supreme Court [sic], the [Amended] PPA is not yet effective.").

C.

Declining To Adopt The Consumer Advocate's Suggestion

Upon review and consideration of the record and circumstances, the Commission declines to adopt the Consumer Advocate's request to make additional findings regarding Hu Honua's request for preferential rates.⁹⁹ The Commission believes that it sufficiently addressed this issue in D&O No. 38395 and, in light of this Order's denial of HELCO's and Hu Honua's Motions for Reconsideration, no further findings are warranted.

IV.

ORDERS

THE COMMISSION ORDERS:

1. Hu Honua's request for a hearing on its Motion for Reconsideration is denied.
2. HELCO's Motion for Reconsideration is denied.
3. Hu Honua's Motion for Reconsideration is denied.

⁹⁹See CA Reply at 27-29.

4. This docket is closed, unless ordered otherwise by the Commission.

DONE at Honolulu, Hawaii JUNE 24, 2022.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By James P. Griffin
James P. Griffin, Chair

By Jennifer M. Potter
Jennifer M. Potter, Commissioner

By (ABSTAINED)
Leodoloff R. Asuncion, Jr., Commissioner

APPROVED AS TO FORM:

Mark Kaetsu
Mark Kaetsu
Commission Counsel

2017-0122.ljk

CERTIFICATE OF SERVICE

The foregoing Order was served on the date it was uploaded to the Public Utilities Commission's Document Management System and served through the Document Management System's electronic Distribution List.

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COMMISSION

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